No. 11,633

United States
Circuit Court of Appeals
For the Ninth Circuit

BUTTE COPPER AND ZINC COMPANY,
a corporation,

Appellant,

vs.

MRS. NELLIE ALLEN POAGUE,

Appellee.

Appeal from the District Court of the United States for the District of Montana

PETITION FOR REHEARING

H. L. Maury,
Earle N. Genzberger,
A. G. Shone,
Attorneys for Appellee

McKEE PRINTING CO. BUTTE, MONT.

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Comes now Mrs. Nellie Allen Poague, Appellee in the above-entitled case and presents this, her Petition for Rehearing of said cause and in support thereof respectfully shows:

I. That this Court, in its decision, has departed from the rule of *Catron v. South Butte Mining Company,* 181 *Fed.* 941, and has not enforced the legal duty and obligation defined in such decision against the party therein stated to be under such obligation, to-wit: the adjoining landowner.

II. That the duty of subjacent and lateral support,

which the Court, in its opinion, concedes to be absolute, cannot be delegated by a contract.

III. That the said decision permitted the delegation of such statutory and common law duty of surface support and is contrary to the overwhelming weight of both English and American authorities.

IV. That the Court has misconstrued the evidence in this case relative to the contracts between the Butte Copper & Zinc Company and the Anaconda Copper Mining Company.

V. That the verdict of the jury and the judgment of the Court below, is supported by the evidence herein in holding that Butte Copper & Zinc participated in the mining operation, contrary to the finding of the decision of this Court.

I, II, III.

The opinion in this case holds and rightly:

> "As indicated, appellee asserts that the right of surface support is absolute unless expressly waived, and that on every grant of minerals there is an implied reservation of surface support—that the question of negligence is not involved. (Citing Lindley on Mines, Vol. 3, Secs. 818-819.) Butte makes no contention to the contrary, but concedes this to be the rule in Montana. *It also concedes the right of the surface owner to lateral and subjacent support as set forth in Catron v. South Butte Mining Co., (9 Cir.)* 181 *Fed.* 941, *and in Sec.* 6773 *of the Revised Codes of Montana of* 1935, which Code provision relates to the rights of a coterminous owner to lateral and subjacent support from adjoining lands." (Op. p. 6.)

Who has the duty to give such surface support? The answer is obviously the owner of the adjoining land—in this case, the owner of the minerals. Against whom must this plaintiff enforce the right which this Court concedes she has? Obviously, the owner of the adjoining land, which is the land underneath and adjacent to her property. There is no difference between this case and the ordinary case involving adjoining landowners, except that the boundaries of the land here run horizontally instead of vertically.

The withdrawal of the support of Nellie Poague's house was the withdrawal of the *lateral* and also *subjacent* support. Where the duty to support exists, the vast weight of authority is that it is absolute, and that the happening of the subsidence and incident damage in breach of that duty *of itself,* causes liability. This question was before the Supreme Court of California in the case of *Green v. Berge,* 105 *Cal.* 52, 38 P. 539, and *at page* 541 the Court said:

> "Except in the case of Aston vs. Nolan, 63 Cal. 269, all the authorities I have been able to find hold that the landowner who causes such an excavation to be made, cannot relieve himself of responsibility by any contract he could make. Cooley, in his work on Torts, speaking of the exceptions to the rule that the master is not liable for the negligence of an independent contractor, or the servants of such contractor, says: 'He must not contract for that, the necessary or probable effect of which would be to injure others, and he cannot by any contract, relieve himself of duties resting upon him as owner of real estate, not to do or suffer to be done upon it that which will constitute a nuisance, and, therefore, an invasion of the rights of others'."

In that decision, the Supreme Court of California refers to Section 832 of the California Civil Code, which is identical with Section 6773 of the Revised Codes of Montana, 1935, relied on by the appellees herein.

In the case of *Catron v. South Butte Mining Company, supra,* this Court said:

> "When the surface of land is owned by one, and the mineral beneath, with the right to extract the same, is owned by another, it is immaterial whether the two interests have been created by a conveyance of the surface with a reservation of the mineral, or by a grant of the mineral with a reservation of the surface. *In either case, the obligation to protect the surface is the same.*"
>
> *Catron v. South Butte Mining Company (C. C. A. 9th)* 181 *Fed.* 941.

Upon whom does "the obligation to protect the surface" rest? Unquestionably, upon the owner of the minerals. Does this Court now mean to overrule its decision in the *Catron case?* If this Court meant what it said in the *Catron case,* that there is an obligation to support the surface on the part of the owner of the minerals, can such owner delegate such obligation by a contract to which the owner of the surface is not a party? This is the first question for this Court to determine, and the opinion herein is silent on that point—merely assuming that the contract between Butte and Anaconda is determinative of the rights of the plaintiff in the case, notwithstanding the fact that this poor negress was not a party to such contract.

The Supreme Court of California said:

> "The general rule is that all who unite in such acts are wrongdoers, and are responsible in damages. Respondent knew, or should have known, that to make the excavation without supplying the support, was unlawful. Having participated in it, he cannot avoid responsibility by pleading that he did the work under contract."
>
> *Green v. Berge, (Cal.)* 38 *Pac.* 539, 541.

This rule was probably first announced in the case of *Bower v. Peate,* (1876) *L. R. I. Q. B. Div. (Eng.)* 321, 45 *L. J. Q. B. N. S.* 446, 35 *L. T. N. S.* 321, which the author of the monograph in 23 A. L. R., 1016 says is "the leading case in both England and the United States, and contains the most accurate and comprehensive exposition of the doctrine" for which we here contend:

> "A man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbor must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing someone else—whether it be the contractor employed to do the work from which the danger arises, or some independent person—to do what is necessary to prevent the act he has ordered to be done, from becoming wrongful. There is no obvious difference between committing work to a contractor to be executed, from which, if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted." (23 A. L. R. 1018.)

That case is further quoted from extensively in the note in 23 *A. L. R., at page* 1033.

That case was quoted with approval by the Supreme Court of Montana and followed in the case of *Ulmen v. Schwieger,* 92 *Mont.* 331, *at p.* 348, 12 *P.* (2d) 856, *at p.* 860. The Supreme Court of Montana also quoted with approval from the case of *Covington & Cincinnati Bridge Co. v. Steinbrock, (Ohio),* 55 *N. E.* 618, 619, as follows:

> "In that case the court stated the general rule as follows: 'That weight of reason and authority is to the effect that, where a party is under a duty to the public or third person to see that work he is about to do, or have done, is carefully performed so as to avoid injury to others, he cannot, by letting it to a contractor, avoid his liability, in case it is negligently done to the injury of another'."
>
> *Ulmen v. Schwieger, (Mont.)* 12 *P.* (2d) 856, *at p.* 860.

The notes in 23 A. L. R. comencing at page 1016, particularly at page 1033, et seq., and also the previous note in 23 A. L. R. commencing at page 984, are all to the effect that a defendant upon whom there is a duty imposed by law, cannot escape that duty by contracting with another insofar as to bar a recovery by a third person damaged by such non-performance.

See also *Luce v. Holloway,* 156 *Cal.* 162; 103 *Pac.* 886.

The Supreme Court of the United States said:

> "It would be monstrous, said Lord Campbell, if a party causing another to do a thing, were exempted from liability for the act merely because there was a contract between him and the person immediately causing the act to be done, which may be accepted

as correct if applied in a case where the work contracted to be done will necessarily, in its progress, render the street unsafe and inconvenient for public travel. Ellis v. Gas Cons. Co., 2 Ell. & Bl., 770; Newton v. Ellis, 5 Ell. & Bl., 124; Lowell v. R. R. Co., 23 Pick. 31. More than one party may be liable in such a case, nor can one who employs another to make such an excavation relieve himself from liability for such damages as those involved in the case before the court, by any stipulation with his employe, as both the person who procured the nuisance to be made and the immediate author of it are liable. Storrs v. Utica, 17 N. Y., 108; Creed v. Hartmann, 29 N. Y., 591; S. C. 8 Bosw., 123; Congreve v. Smith, 18 N. Y., 79; Congreve v. Morgan, 18 N. Y., 84; Shearm. & Redf. Neg., 423; Mayor F. Furze, 3 Hill, 616; Milford v. Holbrook, 9 Allen, 21."

The St. Paul Water Company v. Ware, 83 *U. S. (16 Wallace)* 566, 577, 21 *L. Ed.* 485, *at p.* 488.

A comparatively recent California case is that of *Wharam v. Investment Underwriters*, 136 *P.* (2d) 363, 365. The Court will note the words "joint enterprise" in the quotation from that case:

"The last point remaining for consideration is the contention of the appellant land owner that there is no liability as to it because the excavating was done by an independent contractor. This contention is clearly determined against the defendant land owner by California authority. In this case, the land owner and contractor are both liable as joint tortfeasors for negligent trespass, for negligence in excavating on defendant's lot, and as parties to a joint enterprise which deprived the plaintiff of his common law right of lateral support. Green v. Berge, 105 Cal. 52, 38 P. 539, 45 Am. St. Rep. 35; Hed-

strom v. Union Trust Co.,* Supra; 2 C.J.S., Adjoining Landowners, 17 p. 18."

And again:

"The defendants are liable as joint tort-feasors for negligence in excavating on defendant's lot, and for the removal of lateral support, because in the case of Green v. Berge, supra, our Supreme Court held that a coterminous owner and his contractor are liable jointly for the fall of adjacent property when not supporting it properly on excavation, thereby overruling the prior case of Aston v. Nolan, 63 Cal. 269. This holding is supported by the weight of authority throughout the United States. See comment 20 Cal. Law Review 62, at page 67, and authorities there cited; 2 C. J. S., Adjoining Landowner, 16 p. 17; 1 A. J. 527."

Wharam v. Investment Underwriters, 136 *P.* (2d) 363, 365.

There is nothing sacred about mining operations in the eyes of the courts.

"The question of nuisance vel non is not to be determined in the abstract. Every case must be considered with reference to its own peculiar facts and circumstances. No one would have the temerity to contend that mining is per se a nuisance; but it is elementary that a business otherwise lawful and useful may become a nuisance, by reason of its location or the manner in which it is conducted.

* * * * *

"If the evidence brings appellant's mining operations within the definition given in Section 6162 above, it is no defense to say that they were carried on according to approved methods, or that in maintaining the nuisance, appellant exercised due care, or that mining is necessary to the industrial life of the particular district. Community benefits cannot be

* (Cal.) 94 Pac. 386.

urged as justification for the injury or destruction of private property without compensation."

Cavanaugh v. Corbin Copper Co., 55 *Mont.* 173, 174 *Pac.* 184.

The Montana Statute defining a nuisance is:

"Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance."

8642, *R. C. M.,* 1935.

The text books, encyclopedias, judicial decisions speak of withdrawals of lateral support when there is no invasion of the property itself as nuisances.

Kinkead, in his work on Torts, discusses such in a chapter on "Injury to Real Property by Nuisances," at par. 691, page 1324.

"If the removal of coal causes such a subsidence in a public street as to cause a nuisance therein, it is no defense that the mining is skillfully done."

City of Scranton v. Peoples Coal Co., (Penn.), 100 *Atl.* 818;

Nuisances, 46 *Cor. Jur.* 716.

In this case, the evidence showed that prior to 1917, the defendant Butte had operated the Emma Mine under plaintiff's property. That following the 1917 Lease and subsequent thereto up to the time of the action, Anaconda, under contract with Butte *re-mined* a portion of the territory underlying plaintiff's property and extracted there-

from, ores which had been left during the previous operations of defendant. The map exhibits and the evidence of the engineers showed those facts.

In *Cameron v. Kenyon-Connell Commercial Co., 22 Mont.* 312; 56 *Pac.* 358, Judge Hunt, a former honored member of this Court (and in fact, the only Montana jurist ever to have membership thereon), said, in speaking of the delegation of statutory and common law duties owed by a corporation and the directors thereof to the public:

> "A company charged with an obligation of this nature, cannot devolve it upon another in a manner so as to exonerate the company from a liability for an injury caused to a third person by the negligent way in which the duty pertaining to the care of giant powder or other dangerous explosives may be executed. In torts, the relation of principal and agent cannot relieve the wrongdoer. (Berghoff v. McDonald, 87 Ind. 559.)"

And again:

> "This rule grows out of 'the greatest principle of social duty that every man, in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he shall answer for it'." (Farwell v. B. & W. Railroad Co., 4 Metc. (Mass.) 49.) It is likewise their duty to avoid the creation of nuisances by their corporation, through its employes acting within the line of their duties.
>
> "Nor will inaction by itself overthrow the force of this obligation upon trustees to so control their corporation's business as to not negligently injure third persons."
>
> *Cameron v. Kenyon-Connell Commercial Co., 22 Mont.* 312; 56 *Pac.* 358.

We have heretofore quoted the decision of the Supreme Court of Montana to the same effect that statutory and common law duties to the public cannot be delegated to another, and in the case of *Fagan v. Silver,* 57 *Mont.* 427; 188 *Pac.* 900, the owner of the adjoining property was held liable whether the actual actor was a lessee or an independent contractor. The owner was also held liable in the earlier case of *Holter Hardware Co. v. Western Mortgage & Warranty Title Co.,* 51 *Mont.* 94; 149 *Pac.* 489, and in the case of *Mitchell v. Thomas,* 91 *Mont.* 370, 389; 8 *P.* (2d) 639, 645, the Court said:

> "* * * and the landlord cannot evade his public duty by private agreement to shift it to another, although such a contract may permit the landlord to recoup his losses from his tenant. Why, then, should the mere fact that the owner has leased the building, in whole or in part, change the rule of liability recognized in all of the decisions in this class of cases? In fact, those decisions which make the statement that it does, *overlook the public duty of the owner and consider the duty of the landlord and tenant inter sese.*" (Italics ours.)

We submit that the decision in this case does overlook *the public duty of the owner of the minerals* and has merely considered the relationship of Butte and Anaconda *inter sese* without regard to the rights of plaintiff who was not a party to such contracts.

Not one of the cases cited by the Court in its opinion, supports the conclusion reached by this Court, but on the contrary, some of these cases support the rule for which we contend—that the landowner and his lessee or contractee are both liable in this character of a case.

The first case cited on page 4 of the opinion, is that of *Greek Catholic Congregation v. Plummer, (Pa.)* 12 *Atl.* 2d. 435. That action involved the ownership of coal alleged to have been wrongfully taken from plaintiff's land by defendants. It was a suit to recover for 25,472 tons of coal taken from land which the defendant had *quit-claimed* to a lessee in settlement of a controverted title. This was not a subsidence case in any way, and in fact the defendant did not own the property when the mining was done, and did not profit thereby. No Pennsylvania statute is cited or relied upon in that case which is applicable here. It does not support the rule of non liability of an owner of a mining claim who draws royalties and otherwise participates in the proceeds of the ore mined. That case is again cited at the top of page 5 of the opinion, as authority for the statement: "The lessor of mining property is not liable for subsidence of the surface caused by mining operations of its lessee." That question was not involved in the *Greek Catholic Congregation case,* nor necessary to that decision.

The case of *Alabama Clay Products Company v. Black,* 110 *So.* 151, reversed a judgment in favor of the plaintiff, as householder, against the defendant mining company because the court below erroneously overruled a demurrer to one count of the complaint. That decision does not support the appellant in this case as shown in the subsequent decision of the Supreme Court of Alabama, in the case of

Republic Iron & Steel Co. v. Barter (Ala.) 118 *So.* 749, *at p.* 751. A later Alabama case which is directly in point with the case at bar because here, as in that case,

Butte Copper and Zinc had previously opened the mine under plaintiff's property, had mined certain ores and had apparently left sufficient support for the surface. Later Anaconda, under a lease from Butte, re-mined this property, and the plaintiff's property subsided. The case of *Republic Iron & Steel Co. v. Barter (Ala.)* 1928; 118 *So.* 749, was an action by the owner of the surface against the owner of the mineral rights thereunder, and it appeared that the defendant in the past, opened a mine under the plaintiff's property and had mined the coal therefrom, leaving pillars and stumps sufficient for subjacent support of the surface, but for several years past, had not operated the mine. Later, defendant leased the property to one Blackwell to mine the coal that was left, and provided that "the lessee is to secure from all surface owners, written releases relieving the company from damage claims as a result of mining operations, breaking the surface, etc," and gave to the lessee full charge of the operations. The lease also contained a clause "that the lessee shall save the company harmless against * * * and pay any claims of any owners of the surface." The surface subsided, and the appellant owner contended that Blackwell, the lessee and not the lessor, was liable. Appellant in its brief, quoted one paragraph from page 751 of the Republic Iron & Steel Co. case, but omitted the following paragraphs:

> "Yet where, as here, the lease contemplates and expressly authorizes the lessee to rob the mine of pillars, and leave the surface without subjacent supports, the lessor as well as the lessee, is liable. Little Schuylkell Navigation R. Coal Co. v. Tamaqua, 1 Walk. (Pa.) 488; Campbell v. Louisville Coal Min-

ing Co., 39 Colo. 379, 89 P. 167, 10 A. L. R. (N. S.) 822. This on the principle embodied in the maxim "Sic utere tuo ut alienum non laedes." Williams v. Gibson, 84 Ala. 228, 233, r. S. 350, 5 Am. St. Rep. 368, 60 Atl. 924, 69 L. R. A. 637.

"The principle is established by universal authority that the right to subjacent support, unless waived by express stipulation, is absolute, and the owner of the servient estate is liable for its destruction without regard to whether it is destroyed by or through negligence or design, without negligence. Ala. Clay Products Co. v. Black, 110 So. 151; West Pratt Coal Co. v. Dorman et al., 161 Ala. 389; 49 So. 849, 23 L. R. A. (N. S.) 850, 135 Am. St. Rep. 127, 18 Ann. Cas. 750.)

Republic Iron & Steel Co. v. Barter (Ala.) 118 *So.* 749, *at p.* 751.

With reference to the duty of surface support, the Supreme Court of Alabama, after the decision in the case of *Alabama Clay Products v. Black, supra,* relied upon by this Court, said:

"It cannot avoid this duty or liability for a breach thereof by expressly authorizing Blackwell to do that which it could not legally do. The duty here springs out of plaintiff's right and rests upon the owner of the servient estate.

"* * * * And this is true, though no control or direction over the work is retained and exercised."

Republic Iron & Steel Co. v. Barter, supra.

So that the Alabama law cited does not support the conclusion of this Court at page 5 of the opinion.

The Court also cites the case of *Jackson Hill Coal Co. v. Bales (Ind.)* 108 *N. E.* 962. No facts are stated in that

opinion, but it does appear that the Court did give Instruction No. 2 (see 108 N. E. at p. 964) to the effect that "the owner of the minerals could not remove same without leaving proper support for the surface." That case apparently held the *owner* of the mine and not the *lessee,* liable. It does not support the proposition for which this learned Court has cited it.

The Pennsylvania case of *Kistler v. Thompson, 27 Atl.* 874, was an action brought by the owner of a dwelling house against the defendant owner of a mine for work done by a lessee thereof which injured plaintiff's house and lot. The Supreme Court passed upon the charge of the Court below to the jury in that case. In that charge, the Court differentiated between the diversion of a subterranean hidden stream of water and the disturbance of the surface; and, the Court charged that the owner is required to leave enough coal to support the surface, or if he takes out all of the coal (he being the owner), he must substitute sufficient supports to keep the surface in place. That is a duty that is imposed upon him, and the Court points out the distinction between surface cracks so caused which divert a stream of water from the surface, and the tapping of a subterranean stream. The Supreme Court of Pennsylvania, in approving this charge to the Jury, said:

> "The defendant was the owner of the mine. He received the royalty for the coal taken out. It was his interest to have as much coal taken out as was possible, and did give frequent and explicit directions as to taking coal from the pillars and supports of the mine."

Admittedly there was control there, but the question would probably have been decided likewise without the evidence of control. In that case, the written leases had been lost, and the Court admitted oral evidence of the contents of the leases.

In the case of *Cabot v. Kingman (Mass.)* 33 *L. R. A.*, 45 *N. E.* 344, it was held that sewer commissioners were liable together with the independent contractor for destruction of lateral support in constructing a sewer irrespective of the question whether or not control over the manner of operation had been retained.

It is interesting to note that in each of the cases cited by this Court on page 5 as supporting the rule that the lessor of mining property is not liable for subsidence, that the lessor was in fact, held liable and that judgment was rendered in favor of the injured landowner against the lessor, even though the operations in control of the lessee caused the damage.

We ask the Court in all fairness to again read these decisions upon which it relied on page 5 of the opinion, and reconcile the conclusion reached with the statements made by the Alabama court in Republic Iron & Steel Com. v. Barter, supra, "That it (the owner) cannot avoid this duty or liability for a breach thereof by expressly authorizing Blackwell to do that which it could not legally do. The duty here springs out of plaintiff's right *and rests upon the owner of the servient estate.*"

The Court in its opinion at page 5 cites *Sections* 820 *and* 837 *of the Restatement of Torts.* The rule, Section 837 and Paragraph d of 837, shows the exact state of facts here. We again call to the attention of the Court that the

original 1917 lease was upon an existing mine owned and operated at that time by this defendant. We have argued this case upon the hypothesis that Butte owned the minerals underlying the Poague property by reason of its extra-lateral rights in the Emma Czarromah vein, but in using this hypothesis, we do not concede that the appellant had title to any ground vertically beneath Nellie Poague's property. The Nellie lode was located after the townsite title, was actually superior to appellant's lode claim title.

Davis v. Wiebbold, 139 U. S. 507; 11 Sup. Ct. Rep. 628

The joint enterprise contracts contemplated trespass against her land underneath the surface on the known dip of the vein, and for such trespass, the lessor agreed and got equal division of the fruits.

The almost absolute liability spoken of in the Restatement for withdrawal of *subjacent* support originates from the knowledge that subsidence therefrom is inevitable at some time. Such lack of contingency was known when all the contracts were drawn. When this is considered, even under the erroneous theory of appellant adopted by the Court, Butte is liable. The Court will recall the language of the Wharam case, supra, "it was the purpose of the contractor to trespass on plaintiff's lot." The presumption from Poague's possession is for this appeal proof enough of her title. Had it been assailed, such assault would have failed under the *Davis-Wiebbold case, supra.*

It would also startle legal students in Massachusetts, Alabama and Washington, to read the interpretation that

this Court has placed upon the decisions quoted on page 5 of the Court's opinion. Each of those cases reached the conclusion contrary to that of the Circuit Court of Appeals in the Ninth Circuit, in the cases cited. Indeed, there were only two cases in the United States which directly support the conclusion reached.

Aston v. Nolan, 63 *Cal.* 269, the early California case, which was expressly overruled in *Green v. Berge,* supra, and *Wharam v. Investment Underwriters,* supra, and the 1846 Pennsylvania case of *Offerman v. Starr, 2 Pa.* 394; 44 *Am. Dec.* 211, which was a case where the lessee started mine in question from the grass roots, and where the lessor never did have a mine on the premises. Yet the doctrine of that case was not followed in the later case of *Kistler v. Thompson (Pa.), 27 Atl.* 874, nor in the numerous other Pennsylvania cases which have upheld recovery cases against the lessors, as well as the lessees in possession of coal mines in that state. Indeed, as pointed out by the Supreme Court of Alabama in *Republic Iron & Steel Co. v. Barter,* 118 *So.* 749, the rule which this Court now adopts, was merely *dictum* in the three cases therein cited.

Of course, not only is the law absolute that the adjacent owner contracting for, or authorizing the work on his land (a servient tenement), by any contractor is liable but that is the public policy. It is often idle to sue an independent contractor, for he might be insolvent.

If the Court inquires mentally why the actor was not joined as a defendant, the answer is to look to the Constitution of the United States, and note that even in 1789,

it was known that the local power and influence of some people required the establishment of courts of greater power to insure justice for persons without local influence.

Upon the oral argument, the advantage in coming to the Federal Court in this case, was stated to be to secure a jury made up of citizens of the neighboring counties to the County of Silver Bow, where there would be less local influence brought to bear on such jury.

In closing the oral argument, the counsel for appellant made a disparaging remark relative to the judge of the Court below and alleged that the reason that this case had been brought in the United States Court, was because the then Federal Judge had been formerly a law partner of one of plaintiff's counsel. Coming as it did at the close of the argument, no opportunity was given to reply to this uncalled for and untruthful remark, but it apparently had its effect upon the minds of the judges who heard the argument.

The facts are that Judge James H. Baldwin died suddenly, October 26, 1944. At the time of his death, there was pending, or had been settled in his court, the following subsidence cases arising out of the same contentions as exist in the case at bar.

Lloyd v. Butte Copper and Zinc, filed November 19, 1941;

Thorne et al v. Butte Copper and Zinc, filed November 18, 1943;

Ed Bolever v. Butte Copper and Zinc, filed October 9, 1944;

Mary Eschenbacher v. Butte Copper and Zinc, filed October 6, 1944;

Susan R. Bolever v. Butte Copper and Zinc, filed October 5, 1944.

All of these cases have been paid. Anaconda was not joined. The counsel were the same. The partnership ended 15 years ago, of Maury, Brown and Maury.

IV.

THE CONTRACT RELIED UPON BY THE COURT HEREIN TO DEFEAT PLAINTIFF'S CLAIM IS NOT AN ORDINARY LEASE, BUT A JOINT ENTERPRISE OR GENERAL PARTNERSHIP AGREEMENT.

Relying upon the general principle laid down by this Court in the case of *Catron v. South Butte Mining Company,* 181 *Fed.* 941, and the Montana Statute, 6773, R. C. M., 1935, which was taken from the California Statute, Section 832 of the California Civil Code, and the decisions made pursuant thereto, the nature of the contracts between Butte and Anaconda were regarded as being of secondary importance because the decisions of both Montana and California, as well as the overwhelming weight of American and English authorities, was to the effect that such duties and obligations as were owed by the owner, were non delegable, and that therefore, the rights of this plaintiff to subjacent and lateral support could not be affected by such contracts. However, the Circuit Court of Appeals in the decision, now holds to the contrary, and holds in effect that the contract between Butte and Anaconda was an ordinary lease finding, and we quote from page 3 of the opinion:

"Butte *merely leased* its mining property to Anaconda for a percentage of the net returns from the ores and minerals extracted. *It did not agree to share any losses from such operations and the right to work the mining property and the right to possession thereof, was the right of Anaconda.*

Both of these statements in this quotation are erroneous and are contradicted by the Record in this case.

We contend that the contract did not constitute an ordinary lease for these reasons:

First—in an ordinary lease, the royalties, usually from 10% to 20%, are based upon net smelter returns, and the landowner receives that proportion of the proceeds of ores smelted, regardless of mining or development costs, or the profit or losses to the lessees. Not so with the Butte-Anaconda contract. At page 389 in the Agreement of June 1, 1933, (Exhibit 10), it is provided:

"1. The said agreement between the parties hereto dated the 7th day of June, 1932, shall be terminated as of the 1st day of June, 1933, provided that the Mining Company shall be entitled to deduct, as hereinafter provided in paragraph 4, all amounts expended pursuant to said agreement, as well as any and all amounts expended *or to be expended* under said lease, and this agreement, in arriving at the net returns of *any future operations* and making the division provided in Article Fourth of said lease.

"2. The Mining Company agrees to expend over the three months' period, beginning June 1, 1933, and ending August 31, 1933, approximately the sum of Forty-five thousand Dollars ($45,000) in the aggregate for (a) repairs to levels, stopes and working places in the mines covered by said lease, (b) reconditioning the mining machinery and equipment, and

(c) for all other purposes required by said lease, including all expenditures made during the month of June, 1933, by the Mining Company under the abovementioned agreement dated the 7th day of June, 1932. The Mining Company shall deliver to the Zinc Company, on July 15, 1933, August 15, 1933 and September 15, 1933, a certified statement showing its expenditures under this paragraph 2.

* * * * *

"4. Before making any division of the net returns *of any future operation* under said lease or paying any part thereof to the Zinc Company, as provided in Article Fourth of said lease, the Mining Company shall be entitled to and shall deduct from such net returns

(a) All amounts heretofore expended by the Mining Company under the terms of said agreement dated the 7th day of June, 1932;

(b) All expenditures heretofore made under said lease and which have not been heretofore deducted from said returns, and which by the terms of said lease, the Mining Company is entitled to deduct before making any division of said returns;

(c) All *expenditures hereafter made by the* Mining Company under said lease and which, by the terms thereof, the Mining Company is entitled to deduct before making any division of said returns; and

(d) All expenditures made or to be made under the terms of paragraph 2 hereof;

it being understood that the Mining Company *shall be entitled to make such deductions* regardless of the period of time required to provide net returns sufficient to equal such deductions, and that until the net returns *of future operations* have been sufficient to provide not only for the items referred to in said Article Fourth, but for the foregoing items as well, the Zinc Company shall not be en-

titled to any part of the net returns of such operations." (Italics ours.)
R. pp. 389-391.

This was followed by the agreement of June 24, 1940, by which time the $45,000 indebtedness named in Paragraph 2 above (R. p. 389) had grown to $357,656.77.

That agreement cancelled the lease dated the 6th day of July, 1917, and all amendments and modifications thereof, but provided:

> "It is understood that such cancellation *shall not affect any rights or obligations which may have accrued under said lease dated the 6th day of July,* 1917, *and said amendments and modifications thereof, prior to the date of such cancellation.* (Italics ours.)
> R. pp. 403-404.

At R. pp. 404-405, that agreement further provides:

> "Third: Before making any division of the net returns of the operation of the property under this lease, or paying any part thereof to the Zinc Company as herein provided, the Mining Company shall be entitled to and shall deduct from such returns, all amounts now remaining undeducted and unpaid which the Mining Company has been and is entitled to deduct under the terms and provisions of the agreement of June 1, 1933, between the parties hereto, and the latter agreement between the parties hereto of December 10, 1934, and the said original lease of July 6, 1917, between the parties hereto, and by and all amendments and modifications thereof.
>
> "That the amount to be deducted by the Mining Company, as herein provided, has been audited and agreed to as the sum of Three Hundred Fifty-seven Thousand Six Hundred Fifty-six and 77/100 Dollars ($357,656.77) as of January 1, 1940, and it is understood and agreed that the Mining Company shall

be entitled to deduct said amount as adjusted to the date hereof from the net returns of any future operation under this lease before making any division of the net returns as hereinafter provided, or paying any part thereof to the Zinc Company, and shall be entitled to deduct said amount, regardless of the period of time required to provide net returns sufficient to equal such deduction, and that until the net returns of future operations, as hereinafter defined, have been sufficient to provide said amount, the Zinc Company shall not be entitled to any part of the net returns of the operation of the property.

"The Mining Company shall be entitled to retain and keep for its own use and benefit, fifty per cent (50%) of the net returns from all ores and minerals mined hereunder, and shall account for and pay to the Zinc Company, the remaining fifty per cent (50%) of said net returns. The Mining Company shall account to the Zinc Company for said fifty per cent (50%), to be paid to the Zinc Company within fifteen (15) days after receiving settlement from the smelter or reduction works, for the ores and minerals shipped. * * *"

R. pp. 404-406.

We ask the Court to bear in mind that at the time of the original lease in 1917, the leased premises was a known and producing mine, not a prospect, and that there had been at that time and at all times since, "net returns" from ores mined therein in the sense of the ordinary mining lease. These ores were the exclusive property of Butte, and yet, under the agreements, Butte was called upon to share the losses because its property, as of January 1, 1940, had an agreed lien upon it in the amount of $357,656.77. (See R. p. 405.) Certainly the property of Butte was called upon to pay the losses of the operation.

Under the laws of Montana, these contracts were nothing more nor less than a general partnership or a joint enterprise for the conduct of a mine.

Wilkinson v. Bell & Bukvich, ...*Mont*....., 168 *P.* 2d 601.

Contribution to any partnership may be made in ore as well as in money.

Second—an ordinary mining lease is usually given on definite, specific mining property. The 1940 lease and its predecessors since 1917, after describing the several properties covered by the lease, adds:

> "Also, all other real property, property rights and interests in property situated in the County of Silver Bow, State of Montana, lying adjacent to or in the immediate vicinity of any of the property above-described, and which the Zinc Company owns or has acquired, *or may acquire during the term of this lease* * * *." (Italics ours.)

And again:

> "It is understood and agreed, that if the Zinc Company shall, during the life of this lease, acquire any other real property or interests in property lying adjacent to or in the immediate vicinity of any of the above described property, that the property or property rights so acquired, shall, during the remainder of this lease term, be subject to and covered by the terms of this lease, and be leased and let hereby to the same effect as if fully described herein."
>
> R. pp. 402-403.

Third—the contract is not an ordinary lease, for the reasons that the *losses were charged against the property* of the lessor, and that the lessor was bound by the terms of the contract as to any other property which Butte

might thereafter acquire, and it also provided (R. p. 408) as to re-working the mine for the purpose of utilizing low-grade rhodochrosite or carbonate of manganese ores present, and to some extent, developed in said properties. It was the ore mined for the purpose of extracting these ores after 1940, which caused the subsidence of plaintiff's property.

The Butte Copper & Zinc Company contributed its property and known ore bodies; the Anaconda Company furnished the skill, experience, staff, smelter and metallurgical facilities, and also agreed "to advance the necessary money to be repaid from operations." Butte Copper & Zinc participated in the expense of operations. They pledged their property against such expense; they could not secure profits until those expenses were paid. An ordinary mining lease does not so provide. A partnership agreement or an agreement for a joint enterprise or joint venture, does in fact, so provide. If this was a mere lease as stated by this Court in its opinion, Butte Copper & Zinc Company would receive a stipulated royalty, based upon the smelter returns from each ton of ore extracted from the mine and shipped to the smelter.

V.

These contracts were before the Court below, and upon the basis of those contracts, the Court instructed the jury that if they found from the evidence—which included these contracts and maps showing the old workings and the testimony of the engineers—that these operations were carried on "with the knowledge and consent of the defendant, Butte Copper & Zinc Company, as its lessee,"

that Butte would be liable. (R. p. 338; also R. p. 349.) The Court also instructed the Jury (R. p. 347) that the plaintiff had and has an absolute right to subjacent and lateral support for the surface and * * * the surface owner has the right to demand sufficient support.

The Court below and the jury found that the obligation to support was that of the owner of the underlying strata—which was Butte. The contracts and the evidence herein, were sufficient to support the verdict of the jury that the mining was done with the knowledge and consent of the defendant, Butte, and that the defendant Butte participated in the profits thereof, and in fact, the record also showed that the earlier contract prescribed the work that was to be done by Anaconda. The 1940 contract provided for the re-mining of the unmined ores, which were left after Butte's previous operations.

To say that the plaintiff has a right to support, and that the owner of the subterranean strata has an obligation to perform, and then to refuse to enforce such obligation, is a denial of justice to the colored woman, who is plaintiff in this case.

CONCLUSION

In our opinion, the decision is erroneous upon the grounds stated herein. The almost unanimous weight of American and English authority is against the conclusion reached by this Court—that the duty to support the surface can be delegated or that a landowner can escape his duty to his neighbor by a contract with a third party to which such neighbor is not a party. The authorities

cited by this Court at page 5 of the opinion, do not support the proposition for which they are cited, and are, if read completely, directly opposed to the conclusion reached by this Court.

The decisions of the Supreme Court of Montana heretofore cited, and the decisions of the Supreme Court of California, under the apposite statutes of California, are all opposed to the conclusion reached by this Court.

The doctrine of this decision is a vicious one in that it departs from the time established rule relating to the right of absolute support of the surface, and the obligation upon the part of the owner of the minerals, and permits such owner to defeat the *right* and evade the *obligation* by leasing his land to an individual or corporation who may be insolvent or irresponsible. It now permits one to injure his neighbor with impunity, providing he does so through a third person.

We ask this Court to again examine the decisions and the Record herein, that it grant a rehearing, and that on such rehearing, that the judgment of the Court below be affirmed.

Respectfully submitted,

H. L. Maury,

Earle N. Genzberger,

A. G. Shone,

Attorneys for Appellee

CERTIFICATE OF COUNSEL

We, the undersigned counsel for the above named Appellee, Mrs. Nellie Allen Poague, do hereby jointly and severally certify that the foregoing Petition for Rehearing of this case, is presented in good faith, and that in our judgment, it is well founded, and that it is not interposed for delay.

H. L. Maury,

Earle N. Genzberger,

A. G. Shone,

Attorneys for Appellee

Service of the foregoing Petition for Rehearing acknowledged and 2 copies received this..... day of December, 1947.

W. H. Hoover,

R. H. Glover,

John V. Dwyer,

J. T. Finlen, Jr.,

Sam Stephenson, Jr.,
Attorneys for Appellant